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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 224 55593

Office: VERMONT SERVICE CENTER

Date: JAN 31 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of New Jersey in March of 2000. It is engaged in international trading. It seeks to employ the beneficiary as its president. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be performing primarily executive or managerial level duties for the United States organization.

On appeal, counsel for the petitioner asserts that the beneficiary clearly has been working in an executive capacity or at least a managerial capacity.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary would continue in his management position with the petitioner and described the beneficiary's responsibilities as follows:

His job duties will continue to be to establish the operations in the US and to be overall in charge of all functions including sales and marketing, operations, purchases and finance.

He will continue to have direct responsibility for the profit/loss of the US operation and have direct authority to negotiate all prices and costs including leases, the hiring and firing of personnel, negotiating of salaries and negotiating of services from outside vendors. He will also be responsible for setting strategy, selecting the product mix, determining the marketing strategy and setting the pricing structure.

The petitioner also submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the year beginning March 30, 2000 and ending February 28, 2001. The IRS Form 1120 revealed gross receipts in the amount of \$652,011, compensation paid to officers in the amount of \$20,000, salaries paid in the amount of \$4,500, and a net taxable income of \$3,461.

The director requested a more detailed description of the beneficiary duties in the United States including a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis. The director also requested the petitioner's organizational chart and a complete position description for all the United States entity's employees.

In response, the petitioner provided the following:

[The beneficiary] as President, will continue to establish and expand the US operations in a profitable manner with a view to grow it rapidly. As President, he will be in complete charge of all functions of the US subsidiary including sales, marketing, operations, purchases, finance, HR, etc. He will continue to have direct responsibility for the Profit and Loss as well as the Return on Investment of the US entity. As such, it will continue to be his responsibility to negotiate or supervise the negotiation of all contracts (including leases) prices, salaries and so on. He will

also continue to be responsible for the hiring, supervision and termination of all employees. He will continue to negotiate services and costs with all outside vendors. He will continue to set strategy, identify and select the product mix, determine the marketing mix, marketing strategy and pricing. Attend trade shows or lead teams or supervise the representation of [the petitioner] at these trade shows. We have submitted evidence that he has attended these shows, is on the payroll of the company and does all the above-described activity. . . . As President [the beneficiary] is in charge of the Company has functional as well as supervisory authority of all aspects of the operations and as an Executive is responsible for everything that we do and have the authority to do. [The beneficiary] will be devoting 100% of his time managing the functional as well as the supervisory aspects of the entire operation of the company.

The petitioner also indicated that three people currently reported to the beneficiary, a salesman, an office person, and an accounts person. The petitioner also provided its current organizational chart depicting the beneficiary as president and three unfilled positions under his supervision.

The director determined that the evidence indicated that the beneficiary would be performing many of the duties related to a first-line supervisory position. The director concluded that the record did not support a finding that the beneficiary had been or would be employed in a primarily managerial or executive capacity or that the petitioner required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the petitioner has grown significantly and that the beneficiary works in an executive and managerial capacity. Counsel specifically asserts that the beneficiary's authority to negotiate contracts and to enhance the size of the business is necessarily an executive and managerial duty. Counsel contends that if the beneficiary cannot be an executive because of the small size of the company, the beneficiary is a functional manager of the company. Counsel also submits letters from two companies indicating that the companies have been buying goods from the petitioner since June of 2000 and November of 2000.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner submitted a general position description that referred, in part, to responsibilities for "all functions including sales and marketing, operations, purchases and finance," and "negotiat[ing]

all prices and costs including leases, the hiring and firing of personnel, negotiating of salaries and negotiating of services from outside vendors," and "setting strategy, selecting the product mix, determining the marketing strategy and setting the pricing structure." These responsibilities are indicative of an individual providing all the necessary services for the company to continue its operation. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Although not stated clearly in the director's decision, the director determined that the beneficiary in this proceeding was primarily providing the services for the petitioning organization. In providing services to the company himself, the beneficiary is not primarily performing managerial or executive duties but is primarily performing non-qualifying duties to continue the company's existence. Further evidence that the beneficiary is the employee primarily providing the services to the company is the lack of additional employees relieving the beneficiary from performing tasks necessary to operate the company. The petitioner's IRS Form 1120 for the year 2000 covering a time period through February 28, 2001 reveals that only \$4,500 was paid to other employees.

The petitioner's response to the director's request for evidence only reiterates that the beneficiary is responsible for providing the majority of necessary services to the company. The petitioner provides evidence that demonstrates the beneficiary is the individual attending trade shows, negotiating contracts, selecting the products, and pricing the products, along with other tasks necessary to operate the company. Although the petitioner refers to three other employees by name, the petitioner does not submit independent evidence that it employed three other individuals at the time the petition was filed. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The only evidence of another employee(s) at the time the petition was filed is the IRS Form 1120 that refers to salaries of \$4,500 being paid and a pay stub issued to one individual in the amount of \$1,333.33 in February of 2001. These amounts do not support a finding that the petitioner employs a sufficient number of employees to relieve the beneficiary from performing the day-to-day tasks necessary to operate a company. The petitioner has not established that the beneficiary is primarily performing executive or managerial duties with respect to operating the company but rather is actually performing the tasks himself to enable the company to continue its existence.

Counsel's assertion that the petitioner has grown significantly since its incorporation and plans to grow further does not necessarily contribute to a finding of eligibility at the time the petition was filed. A petitioner must establish eligibility at

the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971). At the time of filing, the evidence in the record does not demonstrate that the beneficiary had been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position would be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a year-old trading company that claimed to have gross receipts in the amount of \$652,011. The firm employed the beneficiary as president and submitted evidence of a part-time office person. The record does not clearly demonstrate how the \$4,500 in salary noted on the petitioner's IRS Form 1120 was distributed. The petitioner failed to provide evidence that it employed sufficient subordinate staff members to perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary's position. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Beyond the decision of the director, the petitioner has not established that it was doing business for one year prior to the filing of the petition.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

Doing Business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

8 C.F.R. section 204.5(j)(3) states in pertinent part:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(D) The prospective United States employer has been doing business for at least one year.

The petitioner has provided evidence that it was incorporated in March of 2000, a year and a month prior to filing the petition. The petitioner also provided invoices, purchase orders, letters of credit, checks, bank statements, and tax returns to demonstrate the nature of its business. However, the evidence submitted does not predate April of 2000, a year prior to filing the petition. The earliest indication that the petitioner actually began a regular, systematic, and continuous provision of goods and/or services is around August of 2000, when the beneficiary attended a housewares show in Las Vegas, Nevada. The record does not support a finding that the petitioner was engaged in the regular, systematic, and continuous provision of goods and services a year prior to the filing of the petition.

Also beyond the decision of the director, the petitioner has not provided evidence of its ability to pay the beneficiary the proffered wage of \$80,000 per year.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided a pay stub indicating that it paid the beneficiary \$20,000 in January of 2001, an amount reflected on the

petitioner's IRS Form 1120 previously referred to above. The petitioner's IRS Form 1120 for its fiscal year ending in February of 2001 revealed a net taxable income of \$3,461. The petitioner did provide a second pay stub indicating that it paid an additional \$20,000 to the beneficiary in March of 2001, an amount that would apparently be reflected on the petitioner's IRS Form 1120 for its subsequent fiscal year. However, this information does not substantiate the petitioner's ability to pay the beneficiary the proffered salary of \$80,000 per year.

As the appeal will be dismissed for the reasons stated above, these issues are not examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.